

IN THE MATTER OF The Ontario Human Rights Code,
R.S.O. 1981, c.53, as amended.

B E T W E E N:

DIANE GALE

Complainant

- and -

MIRACLE FOOD MART, A DIVISION OF STEINBERG'S INCORPORATED
MIRACLE FOOD MART OF CANADA LIMITED
GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED (A&P)

Respondents

AND

THE ONTARIO HUMAN RIGHTS COMMISSION

Complainant

- and -

UNITED FOOD WORKERS INTERNATIONAL UNION,
LOCALS 175 AND 633

Respondents

B E F O R E: Professor Constance Backhouse
Chair, Board of Inquiry

HEARING: Toronto, Ontario
21, 24, 28 April 1992

APPEARANCES: Geri Sanson, Mark Hart & Kaye Joachim, Counsel for
the Commission
Robin Cumine, Counsel for Steinberg's, Inc.
Daniel J. Shields, Counsel for the Great Atlantic
and Pacific Company of Canada Ltd.
Harold Caley, Counsel for the Union

INTERIM DECISION

This inquiry involves a complaint made by Diane Gale against Miracle Food Mart (a division of Steinberg's, Incorporated), Miracle Food Mart of Canada Limited and Great Atlantic & Pacific Company of Canada Limited (A&P), and a complaint made by the Ontario Human Rights Commission (the Commission) against the United Food & Commercial Workers International Union, Local 175 and 633. Diane Gale's complaint, dated 4 November 1985 and amended 9 August 1989, alleges discrimination in employment on the basis of sex by Miracle Food Mart (a division of Steinberg's Incorporated) pursuant to sections 4(1), 8 and 10 of the Ontario Human Rights Code, 1981, S.O. 1981, c.53. On 7 April 1992, pursuant to a motion of the Commission, Miracle Food Mart of Canada Limited and the Great Atlantic & Pacific Company of Canada Limited (A&P) were added as respondents. The Commission's complaint, dated 4 December 1987, alleges discrimination in employment on the basis of sex by the respondent union, pursuant to sections 4(1) and 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c.53. I was appointed to serve as the Chair of a Board of Inquiry by the Minister of Citizenship on 12 November 1991. This is the second decision to rule on a number of preliminary legal matters.

1) APPROPRIATE FORUM

Mr. Caley, counsel for the Union, and Mr. Cumine, counsel for Steinberg's, Inc., requested that the complaint be dismissed.

because it was more appropriately dealt with under another Act, namely the Employment Standards Act, R.S.O. 1980, c.137, s.32, the Pay Equity Act, S.O. 1987, c.34, as amended by 1989, c.72, s.48, or the Labour Relations Act, R.S.O. 1980, c.228.

Section 34 of the Code states:

34 (1) Where it appears to the Commission that,

(a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;

...
the Commission may, in its discretion, decide to not deal with the complaint.

Counsel argued that portions of the complaint made allegations of discrimination on the basis of pay. The complaint states that the highest paying jobs are held almost exclusively by males, that males are trained in jobs that will lead to higher paying "production" jobs, and that the wage rates paid to males and females reflect discrimination on the basis of sex. Correspondence introduced at the hearing, dated 18 February 1985, indicated that the Employment Standards Branch of the Ministry of Labour had investigated pay differentials between female Deli. Head Clerks and male Meat Managers and concluded that there were no violations of the equal pay for equal work provisions of the Employment Standards Act. On 1 January 1991, after the date of the complaint, a pay equity plan negotiated under the Pay Equity Act came into force.

Many of the allegations in the complaint dealt with matters involving provisions of the collective agreement between the respondent corporations and union. Section 48 of the Labour Relations Act provides that a collective agreement shall not be deemed to be a collective agreement if it discriminates against any person under any ground prohibited by the Ontario Human Rights Code. Section 68 requires that all trade unions have a duty to represent the members of the bargaining unit fairly, without discrimination and in good faith. According to Mr. Caley, a more appropriate avenue for redress against the trade union would be a complaint to the Ontario Labour Relations Board under s.48 or 68 of the Labour Relations Act.

During the investigation process prior to this hearing, Mr. Caley wrote to the Commission requesting that it exercise its jurisdiction under s.34 of the Code to dismiss the complaint as more appropriately dealt with under these other statutes. When the Commission apparently rejected his submissions, through its request for appointment of a Board of Inquiry, Mr. Caley argued that this amounted to a violation of a condition precedent to the jurisdiction of this Board.

This appears to be a misunderstanding of the function of section 34 of the Code, which confers a discretionary power upon the Commission. The Ontario Divisional Court concluded in Re Prudential Insurance Co. of America and Ontario Human Rights

Commission (endorsement, Ont. Div. Ct., 15 November 1989) that:

Section 33 [now s.34] is administrative in nature and gives the Commission a discretion to refuse to or decline to investigate a complaint. If it had exercised that discretion and declined to investigate the complaints it was obliged to exercise that discretion on reasonable and proper grounds in accordance with the purpose of the Code and in particular the terms of s.33 [now s.34]. However, in the three cases before us the Commission refused to exercise its discretion and therefore its reasons for declining to exercise that discretion are not relevant....

In any event, the existence of the Employment Standards Act and the Pay Equity Act does not remove complaints from the jurisdiction of the Commission: [Nishimura v. Ontario Human Rights Commission (1989), 11 C.H.R.R. D/246 (Ont. Div. Ct.)] The Code is much broader than the Pay Equity Act. It covers more employees and more matters connected with employment. Further, the powers provided to boards of inquiry under s.41 of the Code are much broader than those available under the Pay Equity Act. Section 47(2) of the Code states that the Code has primacy over other statutes.

In addition, it is quite clear that unions may be held liable under the Code: [The Office and Professional Employees International Union, Local 267 v. Domtar and the Ontario Human Rights Commission (unreported, Ont. Div. Ct., 19 March 1992 at 12-13)]. The primacy of the Code provides grounds for concluding that no prior resort is required to a complaint under the Labour Relations Act.

2) REASONABLE APPREHENSION OF INSTITUTIONAL BIAS

Mr. Caley argued that the complaint should be dismissed because of a reasonable apprehension of institutional bias on the part of the Ontario Human Rights Commission. He focused his argument on the fact that the complaint against the union was initiated by the Commission itself. He claimed that this created the appearance of bias where the Commission was also legislatively charged with investigating the complaint, deciding whether to request the Minister to appoint a board of inquiry, and prosecuting the complaint. This was accentuated, he argued, where the Commission was empowered under the Code to exercise its discretion under s.34 regarding matters such as the appropriate forum and dismissal for undue delay. All of this could give rise to public concerns regarding the independence and impartiality of the administration of justice, argued Mr. Caley, citing MacBain v. Canadian Human Rights Commission et al. (1985) 62 N.R. 117 (Fed. CA).

The scheme under the former Canadian Human Rights Act, which was found in MacBain to create a reasonable apprehension of bias, is distinguishable from the scheme under the Code. Under the former Canadian Human Rights Act, the federal Commission once in receipt of an investigator's report would decide whether the complaint had been "substantiated". The federal Commission also had the power to appoint a tribunal to hold a hearing to inquire into the complaint. The central difficulty with the scheme arose

from the fact that the very same Commission that had decided the complaint was substantiated also selected the person or persons who would act as a tribunal to hold a hearing to inquire into the complaint. In contrast, under the Ontario Code, the Commission decides only whether the evidence revealed by the investigation warrants the appointment of a board of inquiry. It is the Minister of Citizenship who is responsible for appointing a panel of persons to act as members of boards of inquiry, and for selecting from that panel the person or persons who will sit as a board of inquiry in any case.

It is a fundamental principle of administrative law that common law rules relating to natural justice and bias may be displaced by legislation:

Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se.

Brosseau v. Alberta Securities Commission (1989)
57 D.L.R. (4th) 458 (S.C.C.) at 463-4.

Section 32(2) of the Code empowers the Commission to

initiate a complaint. Section 34 of the Code expressly invests the Commission with the discretion to decide, on any of the specific bases set out in that section, not to deal with a complaint. Section 36 of the Code expressly confers upon the Commission the power to request the appointment of a board of inquiry. Accordingly, the scheme complained of is expressly authorized by the Code.

Finally, any allegation of bias raised before this board of inquiry must relate to a reasonable apprehension of bias on the part of the board, not on the part of the Commission. The union instead focuses entirely upon allegations of bias on the part of the Commission during its process prior to the appointment of this board of inquiry. The Code does not provide for an investigation by the board of inquiry into allegations of reasonable apprehension of bias by the Commission.

3) DELAY

Both Mr. Caley and Mr. Cumine argued that the complaint should be dismissed by this board because of prejudicial and undue delay. Diane Gale filed her original complaint against Miracle Food Mart (a division of Steinberg's, Incorporated) on 4 November 1985. The complaint alleged discriminatory hiring, promotion, and wage practices which impacted negatively upon women. A fact-finding conference was held to investigate the merits of the complaint in March 1987. In April 1987, the

Commission advised that it would be necessary to conduct an extended investigation of the complaint.

The Commission filed its complaint against the union on 4 December 1987. Investigation continued until early 1989, when the Commission officers referred the complaints to the full Commission for a decision as to whether to request the Minister to appoint a Board of Inquiry.

On 29 April 1989, Diane Gale left her employment at Miracle Food Mart, since the store at which she worked was being closed and she did not seek a transfer. On 6 July 1989, an amended complaint was filed, alleging systemic discrimination under the Code. On 11 December 1989, the Commission wrote to the respondents' counsel noting that more information would be required, as a result of Commission counsel having reviewed the file. The parties continued to correspond concerning requests for further information.

On 22 October 1990, there was a sale of selected assets of Miracle Food Mart (a division of Steinberg's, Incorporated) to Miracle Food Mart of Canada Limited, Great Atlantic & Pacific Company of Canada Limited (A&P). There was no disagreement that the part of the business transferred included the business in which Diane Gale had been employed.

On 12 August 1991, the Commission requested the Minister of Citizenship to appoint a Board of Inquiry. On 12 November 1991, the Board of Inquiry, which I chair, was appointed, with a hearing to commence on 27 November 1991. The hearing commenced by way of conference call, with the parties unable to agree to starting the actual hearing until 30 March 1992.

Counsel for the respondents argued that s. 11(b) of the Charter had been violated pursuant to this delay, and cited R. v. Askov, [1990] 2 S.C.R. 1199. Section 11(b) provides that "any person charged with an offence has the right to be tried within a reasonable time." However, I have decided to reject this argument. It appears to have been conclusively decided that s.11 does not apply to remedial proceedings under the Code. Gosh v. Domglass Inc. (unreported, 8 April 1991) (Ont. Bd. Inq., Hubbard) clarifies this point at p. 20-1:

[T]he jurisprudence of this province makes it clear that s.11(b) of the Charter does not apply in respect of remedial proceedings under the Ontario Code. I consider that point sufficiently settled as to make it unnecessary to do more than list a number of the authorities: Commodore Business Machines Ltd. v. Olarte et al. (1985), 6 C.H.R.R. D/2833; Shepherd v. Bama Artisans Inc. (1988), 9 C.H.R.R. D/5049; Gohm v. Domtar Inc. (No. 1) (1989), 10 C.H.R.R. D/5968; Quereshi v. Central High School of Commerce (1988), 9 C.H.R.R. D/4527; Dennis v. Family and Children's Services of London and Middlesex (1990), 12 C.H.R.R. D/285; Maddox v. Vogue Shoes et al. (unreported, Ont. Bd. Inq., 8 April 1991).

The point seems to have been conclusively made by the Supreme Court of Canada in Wigglesworth v. The Queen (1987), 45 D.L.R. (4th) 235, wherein Madam Justice Wilson, speaking for the court, said, at p. 247:

It is my view that the narrower interpretation of s.11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s.11 of the Charter are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offenses, either federal or provincially enacted.

Counsel for the respondents also argued that the delay constituted a violation of s. 7 of the Charter, which provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 7 rights may not be asserted by corporations, but in any event it appears that section 7 of the Charter has no application to remedial proceedings under the Code. There is a fundamental distinction between criminal and quasi-criminal proceedings, in which a person's life, liberty and security of the person may be in jeopardy, and human rights proceedings which are essentially civil in nature: see Re Bennett and British Columbia Securities Commission (1991), 82 D.L.R. (4th) 129 (B.C.S.C.); R v. Beare [1988] 2 S.C.R. 387; Mehta v. MacKinnon et al. (1985), 67 N.S.R. (2d) 112 (Ns.S.C.), aff'd on other grounds, 19 D.L.R. (4th) 148 (N.S.C.A.).

Mr. Cumine also argued that there had been a violation of s. 8 of the Charter, as the delay was tantamount to an "unreasonable search and seizure". Thomson Newspapers v. Canada (1990), 67

D.L.R. (4th) 568 (S.C.C.) confirmed that the rights under s.8 extend not just to the seizing of things by a public official but to the compulsory production of documents or records. However, the standard of reasonableness which prevails in the case of a search or seizure made in the enforcement of criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context:

...the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records. (emphasis added)

- per La Forest, J. at p. 220.

In Thomson Newspapers, supra, the Supreme Court of Canada upheld subpoena duces tecum requiring the compulsory production of documents in an inquiry to determine whether the Combines Investigation Act had been violated, even though that Act provided for penal sanctions including imprisonment. Finally,

the Alberta Court of Appeal has upheld provisions for the compulsory production of documents in the context of a human rights proceeding, noting that these provisions closely modelled provisions for disclosure of documents in civil proceedings which were reasonable and had stood the test of time.

It is rather obvious that the rough model for the procedure under review is that in the Rules of Court for production of documents in a civil proceeding. We are unaware of any criticism of that system as unreasonable or unfair. It has stood the test of time. Those Rules are, we suggest, a fit standard of reasonableness in the situation here, which so closely parallels such a proceeding. In my view, the safeguards are adequate.

Alberta Human Rights Commission v.
Alberta Blue Cross Plan (1983), 4
C.H.R.R. D/1661 (Alta. C.A.) at para
14223.

It is apparent that even more safeguards exist at the stage of a board of inquiry proceeding under the Ontario Code, where any subpoena duces tecum must be issued by the board of inquiry in accordance with the requirements of the Statutory Powers Procedure Act, and where the scope of the subpoena can be challenged on grounds of relevance, privilege or admissibility. For all of these reasons, it is my view that, at least up to this point in the proceeding, there has been no violation of section 8 of the Charter.

Counsel for the respondents also argued that these proceedings should be stayed under s.23(1) of the Statutory Powers Procedure Act, since the delay had rendered it an abuse of process to proceed further. In assessing whether delay has

caused an abuse of process, Ontario boards of inquiry have adopted the standard set out in Hyman v. Southam Murray Printing (No. 1) (1982), 3 C.H.R.R. D/617 (Ont. Bd. Inq., McCamus) at D/621:

[W]hile unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy or in weighing the persuasive...force or credibility of testimony or other evidence, delay in initiating or processing a complaint should not be considered as a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned...a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible. In the absence of such, admittedly unlikely, circumstances, the proper course, in my opinion, is for the board of inquiry to proceed and to weigh the substantial prejudice or unfairness to a particular party which may have been occasioned by delay in making particular findings of fact or in refusing or fashioning a remedy.

[See also: Maddox v. Vogue Shoes unreported, 8 April 1991 (Ont. Bd. Inq., Pilkington); Quereshi v. Central High School of Commerce (1988), 9 C.H.R.R. D/4527 (Ont. Bd. Inq., Ratushny); Gosh v. Domglass Inc., unreported, 22 November 1991 (Ont. Bd. Inq., Hubbard); Gohm v. Domtar (No. 1) (1989), 10 C.H.R.R. D/5968 (Ont. Bd. Inq., Pentney); McMinn v. Sault Ste. Marie Firefighters Assn. (1986), 7 C.H.R.R. D/3458 (Ont. Bd. Inq., Zemans); Shepherd v. Bama Artisans (1988), 9 C.H.R.R. D/5409 (Ont. Bd. Inq., Backhouse).]

The appropriate test, then, appears to be whether the passage of time has rendered it impossible for this board of inquiry to determine whether a breach of the Code occurred. Counsel for the respondents claimed that the delay had created

substantial prejudice to their clients, in that some of the relevant witnesses had retired or died. In a business which employs over 8,000 workers, the loss of some witnesses would undoubtedly have occurred even if this case had reached adjudication earlier. Although the respondents' case will probably be more difficult to argue as a result of the delay, it does not appear that the board of inquiry's statutory mission has been rendered impossible. There are individuals available, both managers and employees, who can testify to the events and practices concerned.

Counsel for the respondents also argued that the passage of time had involved a sale of the business in October 1990, making it significantly more difficult to mount a defence as between the vendor and purchaser corporation. But this too, might have occurred immediately after the filing of the complaint. Delay itself is not the determinant factor here. The vendor corporation had notice of the outstanding complaint prior to the sale, and the purchasing corporation was explicitly notified of the claim in the asset purchase agreement. The latter document contained the following statements:

Miracle Food mart

Diane Gale Human Rights Complaint - This ongoing case relates to a complaint under the Ontario Human Rights Code alleging discrimination on the basis of sex. Settlement discussions have not been successful, the complaint has now been amended and meetings with a job evaluation consultant have taken place at the request of a Human Rights Officer. Outcome of the case and scope of liability is unknown at this time.

Chris Riggs, the lawyer who had acted for the vendor company in this matter, continued to act for the purchasing corporation in this matter until 20 February 1992. It seems to me that the mere sale of a business, under the circumstances outlined here, does not frustrate the board of inquiry's ability to hear the merits of the case.

Counsel for the respondents and counsel for the Commission filed voluminous material with this board in an effort to determine what accounted for the delay in this proceeding. After reviewing the correspondence and considering the written and oral submissions of counsel, I have concluded that the time that passed between the filing of the complaint and the appointment of this board was not the sole responsibility of the Commission. The parties share some responsibility for the lengthy passage of time, and the nature of the case accounts for the rest.

Under the circumstances, I have concluded that it would not be an abuse of process under the Statutory Powers Procedure Act to continue the hearing in this case.

4) PARTICULARS

Mr. Cumine and Mr. Shields, counsel for the respondent corporations, sought a direction pursuant to s.8 of the Statutory Powers Procedures Act for the production of further particulars from the Ontario Human Rights Commission. To date, the

Commission had delivered copies of the complaint, the amended complaint, and a case summary outlining the results of the Commission's investigation. The lengthy case summary included some statistical data and summaries of interviews with 72 individuals employed by the respondents. Mr. Cumine and Mr. Shields sought additional particulars concerning the names of witnesses, dates and locations of events alleged to be discriminatory, details of hiring, training, and wage practices alleged to be discriminatory, and the names of the individuals alleged to have committed the violations of the Code.

The applicability of section 8 of the Statutory Powers Procedures Act to human rights boards of inquiry was dealt with in Veljko Dubajic et al. v. Walbar Machine Products of Canada Limited (1980), C.H.R.R. D/228 (Ont. Bd. Inq., Gorsky) at D/230:

My interpretation of s.8 is that it is concerned with the furnishing of "reasonable information of...allegations..." and not with the means whereby those allegations will be proved. It is concerned with particulars to know a case and not with evidence as to how the case will be proved. It is concerned with the case intended to be made and not with the information allegedly favourable or unfavourable to the case. Furthermore, it is not concerned with facts which might assist the party, against whom the claim is being made, to discover evidence in support of its defence, as contrasted with information of the case to be met....

Salamon v. Searchers Paralegal Services (1987) 8 C.H.R.R.

D/4162 (Ont. Bd. Inq., Zemans) stated at D/4164:

Section 8 of the SPPA is not broad enough to encompass pre-hearing discovery. It requires only disclosure of "reasonable information". There is no legislative provision for pre-hearing discovery of documents.

Nembhard & Manridge v. Cansuop Mfg. Ltd., unreported, dated

11 March 1976, (Ont. Bd. Inq., Lederman) stated at p. 22:

Prior to the hearing, a respondent therefore is entitled to receive sufficient information about the allegations to enable him to prepare his answer to them. This section [s.3 SPPA] does not, however, refer to advance notice of documentary evidence but merely to reasonable particularity of allegations.... Accordingly, there does not appear to be any present power in the Board to order production or inspection of documents prior to the hearing.

Cynthia Joseph v. North York General Hospital (1982)

C.H.R.R. D/854 (Ont. Bd. Inq., Hunter), held at D/855:

In Fairbairn v. Sage (1925), 56 O.L.R. 462 at 470, Ferguson J.A. enumerated the purposes of particulars as follows:

"Particulars are, I think, ordered for several purposes:

- 1) to define the issue;
- 2) to prevent surprise;
- 3) to enable the parties to prepare for trial;
- 4) to facilitate the hearing.

Applying each of these four purposes to the particulars supplied in this case, I am satisfied that the material produced by the Commission adequately fulfils these purposes. Having reviewed the particulars already provided, I have concluded that they reasonably define the issues and enable the respondents to prepare adequately for the hearing. Accordingly, I decline to order further particulars.

Consequently all of the preliminary motions are rejected.



Constance Backhouse
Chair, Board of Inquiry

MAY 8, 1992

